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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

vs.

JOHN HARVEY ADAMSON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

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BRIEF AMICI CURIAE OF THE STATES OF CALIFORNIA, IDAHO, AND WYOMING

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QUESTION PRESENTED

May a death penalty statute, which narrows the class of death penalty-eligible offenders and which provides for individualized consideration of all mitigating evidence proffered by an offender, guide and channel sentencer discretion by requiring that the death penalty be imposed if the aggravating circumstances outweigh the mitigating circumstances?

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INTEREST OF AMICI CURIAE

Amici curiae are states which adopted death penalty statutes in response to this Court's decisions in *Furman v.Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976). Those cases held that the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution requires that death penalty statutes suitably direct and limit the discretion of sentencers in death penalty cases in order "to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia*, *supra*, at 189.) Pursuant to these decisions, we enacted capital punishment laws which narrowed the class of death-penalty

eligible offenders and which provided that our sentencers should consider all mitigating evidence as part of their individualized consideration of the defendants' crime and circumstances.

Having met our Eighth Amendment obligations, we relied on this Court's decisions to adopt various procedures for channeling and guiding sentencer discretion in determining penalty. These procedures included *permitting* "unbridled discretion" (*Gregg v. Georgia, supra*); "weighing" of aggravating and mitigating circumstances (*Proffitt v. Florida, supra*); and responding to specific questions about the defendant (*Jurek v. Texas, supra*). Yet, our statutes have been challenged because they channel and guide the exercise of sentencer discretion. (See,

e.g., *Hamilton v. California*, cert. den., __U.S.__, 109 S.Ct. 879, 880-882 (Marshall, J. dis.); *Bonin v. California*, cert. den., __U.S.__, 57 U.S.L.W. 3619 (Brennan, Marshall, J.J. dis.).)

In this case, the Court of Appeals of the Ninth Circuit invalidated Arizona's death penalty statute because it required that the death penalty be imposed if the sentencer determined that the aggravating circumstances outweighed the mitigating circumstances. We believe that the Ninth Circuit's opinion creates a third requirement for death penalty laws -- "unbridled discretion" for the sentencer in the final determination of penalty. The Ninth Circuit's decision is contradicted by the precedents of this Court which we

relied upon in drafting our death penalty statutes. We believe that if this mistaken Ninth Circuit decision remains uncorrected, it will provide authority for further federal review of other state statutes that guide and channel sentencer discretion in order to minimize arbitrary and capricious action.[1/]

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted in this case to correct the Ninth Circuit's mistaken interpretation of this Court's decisions and to prevent federal review

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1. Amici have focused on only one of the questions presented by Arizona's petition. We express no opinion as to the merits of the other questions presented. We are also aware that a similar question is presented in *Blystone* v. *Commonwealth* (No. 88-6222), cert. granted, 3/27/89.

of a state's procedure for channeling and guiding sentencer discretion in capital cases.

Arizona's death penalty statute requires the sentencer to impose the death penalty if it finds that the aggravating circumstances outweigh the mitigating circumstances. The Ninth Circuit held this provision of Arizona's law unconstitutional because it imposed a so-called "presumption of death" which allegedly deprived murderers of an individualized consideration of their offenses and circumstances. (*Adamson* v. *Ricketts*, 865 F.2d 1011, 1041-1044 (9th Cir. 1988) (limited en banc.)

Amici curiae submit that the Ninth Circuit mistakenly extended this Court's decisions on capital punishment. This Court has held that the Eighth

Amendment requires that a death penalty statute narrow the class of death-penalty eligible offenders and that the sentencer make an individualized determination of the proper sentence by considering all mitigating evidence. However, contrary to the Ninth Circuit's opinion, this Court's cases do not require that the sentencer have "unbridled discretion" in finally determining the appropriate penalty. The Ninth Circuit, by requiring "unbridled discretion," improperly intruded into Arizona's scheme for channeling and guiding sentencer discretion that is part of Arizona's "effort to achieve a more rational and equitable administration of the death penalty." (*Franklin* v. *Lynaugh*,

__U.S.__, 108 S.Ct. 2320, 2331 (1988) (White, J. plur.).)

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HOLDING THAT THE ARIZONA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE IT REQUIRES THE DEATH PENALTY TO BE IMPOSED IF AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES CONSTITUTES AN ERRONEOUS EXTENSION OF FEDERAL REVIEW TO A STATE'S PROPER EFFORT TO PROVIDE SUITABLE DIRECTION AND LIMITS IN THE EXERCISE OF DISCRETION IN DETERMINING THE PENALTY IN CAPITAL PROCEEDINGS

The Arizona death penalty statute narrows the class of death penalty eligible offenders and provides for consideration of all mitigating evidence. (Ariz. Rev. Stat. § 13-703.) The Arizona death penalty law requires the sentencer (a judge) to impose the death sentence if it finds the existence of one statutory aggravating factor and

does not find the existence of any mitigating factors substantial enough to call for leniency. (*State v. Beaty*, 158 Ariz. 232, 762 P.2d 519, 533-534 (Ariz. 1988).) Arizona has interpreted its law as requiring the sentencer to impose the death penalty if the aggravating circumstances qualitatively outweigh the mitigating circumstances. (*State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13-14 (1983).) The United States Court of Appeals for the Ninth Circuit has now held that this provision of the Arizona law is unconstitutional because it creates a supposed "presumption of death" that precludes individualized sentencing based on the circumstances of the offense and the offender. (*Adamson v. Ricketts*, 865 F.2d 1011, 1041-1044 (9th Cir. 1988) (limited en banc).)

Amici curiae submit that the Ninth Circuit's holding constitutes an unwarranted extension of this Court's jurisprudence. We contend that once a state establishes a rational scheme for the discretionary consideration of aggravating and mitigating factors, that further federal review is unnecessary. However, the Ninth Circuit has, in fact, engrafted a third requirement of "unbridled discretion" for sentencers.

As recently as 1988, this Court held that the Constitution "requires no more" than that death penalty statutes "narrow[ ] the class of death-eligible murderers and then at the sentencing phase allow[ ] for the consideration of mitigating circumstances and the exercise of discretion." (*Lowenfield v. Phelps*,

__U.S.__, 108 S.Ct. 546, 555 (1988).) However, this Court has never indicated that the states must guide the exercise of discretion in a certain way or, as the Ninth Circuit holds, permit that exercise of discretion to be unbridled. "Much in our cases suggests just the opposite." (*Franklin v. Lynaugh*, __ U.S.__, 108 S.Ct. 2320, 2331 (1988) (White, J. conc.).)

Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), capital sentencers had unbridled discretion in determining penalty. (*McGautha v. California*, 402 U.S. 183 (1971).) However, in *Furman*, this Court declared such total discretion unconstitutional because it lead to irrational and arbitrary results. (*Gregg v. Georgia*, 428 U.S. 153, 188 (1976) citing *Furman v.*

Georgia, supra.) Since *Furman*, this court has "identified a constitutionally permissible range of discretion in imposing the death penalty." (*McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).) That permissible range falls between "a required threshold below which the death penalty cannot be imposed" and the requirement that the sentencer be permitted to consider all mitigating evidence. (*Id.* at 305-306; see also *California v. Brown*, 479 U.S. 538, 541 (1987).)

This Court has merely indicated that it will *tolerate* "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death-penalty eligibility and has considered all mitigating evidence. "[T]his Court has

never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." (*Franklin v. Lynaugh, supra,* 108 S.Ct. 2331) (White J. plur.).)

It is understandable why states choose to canalize the discretion of sentencers in considering the circumstances and determining the final penalty. This Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created "a substantial risk that [the death penalty] would be inflicted in an

arbitrary and capricious manner." (*Gregg v. Georgia*, *supra*, 428 U.S. at 188 citing *Furman v. Georgia*, *supra*.) Channeling a sentencer's discretion can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. (See *California v. Brown*, *supra*, 479 U.S. at 543.) Furthermore, states can ensure that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (*Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (White, J. conc.); *Jurek v. Texas*, 428 U.S. 262, 278-279 (1976) (White, J. conc.).) The channeling of sentencer discretion can "minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia*, *supra*, at 189.) Such schemes promote the rational and

predictable administration of death penalty laws. (*California v. Brown*, *supra*, 479 U.S. at 541.) Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*Furman v. Georgia*, *supra*, 408 U.S. at 238 (White, J. conc.).) They also foster reliability and further judicial review. (*California v. Brown*, *supra*, 479 U.S. at 543.)

These schemes do not sacrifice the requirement that death sentencing be individualized because they do not preclude the admission and consideration of any relevant mitigating evidence. As a "practical matter" sentencers will be aware of the consequences of their

weighing of the aggravating and mitigating. (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331 fn. 12 (White, J. plur.).) The "weighing" process does not eliminate subjectivity, but it does set "clear and objective" standards to minimize discrimination. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 189, 198.)

Arizona has chosen to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against Arizona's choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages Arizona's choice of action.

In *Gregg v. Georgia*, *supra*, this Court rejected the argument that the Georgia statute was unconstitutional because it permitted a jury to decline

to impose the death penalty even when aggravating circumstances were present by merely stating that such discretion did not violate the Constitution. (*Id.* at 199, 203.) In *Zant v. Stephens*, 462 U.S. 862 (1983), this Court rejected a renewed challenge to Georgia's "unbridled discretion by simply noting that the Constitution did not require specific standards for the jury's consideration of aggravating and mitigating circumstances. (*Id.* at 875, 880, 890.)

Obviously, *Gregg* did not prohibit states from channeling discretion if the states thought it necessary and desirable. In *Proffitt v. Florida*, *supra*, this Court approved a statute, like Arizona's, that required imposition of the death penalty if the

aggravating circumstances outweighed the mitigating circumstances. Florida interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. (*Barclay v. Florida*, 463 U.S. 939, 961-962 (1983) citing *Cooper v. State*, 336 S.2d 1133,1142 (Fla. 1976) (Stevens, J. conc.); see also *Woodson v. North Carolina*, 428 U.S. 280, 315 (1976) (Rehnquist, J. dis.); *Roberts v. Louisiana*, 428 U.S. 325, 362 fn. 8 (1976) (White, J. dis.).) The concurrence in *Proffitt* praised the Florida statute because it "required" the sentencer to impose the death penalty if aggravating outweighed mitigating. (*Proffitt v. Florida*, *supra*, 428 U.S. at 260-261 (White, J. conc.).) When this Court again approved

Florida's statute in *Barclay v. Florida*, *supra*, that state still interpreted its statute as establishing a rebuttable "presumption" of death. (*Barclay v. Florida*, *supra*, 463 U.S. at 961-962 citing *Williams v. State*, 386 S.2d 538, 543 (Fla. 1980) (Stevens, J. conc.).)[2/]

Notably, this Court also approved the Texas death penalty scheme. (*Jurek v. Texas*, 428 U.S. 262 (1976).) That statute required that the death

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2. The Ninth Circuit does not mention this Court's apparent approval of Florida's "presumption" scheme in *Barclay*. Instead, it relies on this Court's opinions that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as suspect." (*Id.* at 1044 citing *Jackson v. Dugger*, 837 F.2d 1469, 1474 (11th Cir. 1988).) Of course, "presumption" cases are inapplicable to the sentencing phase of a death penalty proceeding. (See *Cabana v. Bullock*, 474 U.S. 376, 384-386 (1986) distinguishing *Sandstrom v. Montana*, 442 U.S. 510 (1976).)

sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death-penalty eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. (*Id.* at 270-276 (Stewart, J. plur.).) The concurrence in *Jurek* noted that the sentencer "*must*" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." (*Id.* at 279 (White, J. conc.); see also *Woodson v. North Carolina*, *supra*, 428 U.S. at 315 (Rehnquist, J. dis.); *Roberts v. Louisiana*, *supra*, 428 U.S. at 359 (White, J. conc.).) *Franklin v.*

Lynaugh, supra, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. (*Franklin v. Lynaugh, supra*, 108 S.Ct. at 2330-2332 (White, J. plur.), 2333 (O'Connor, J. conc.).)

This Court's other precedents also indicate, sometimes by negative implication, that "unbridled discretion" is not a constitutional requirement. In *California v. Ramos*, 463 U.S. 992 (1983), this Court reiterated that the constitution is *not* violated by a scheme that permits a jury to exercise unbridled discretion in choosing a penalty once a defendant is found to be a member of the class of death-eligible offenders. (*Id.* at 1008-1009 fn. 22

citing *Zant* v. *Stephens*, *supra*.) In *Turner v. Murray*, 476 U.S. 28 (1986), this Court analyzed the Virginia death penalty law which allows the sentencer to reject the death penalty if there are aggravating circumstances present, but no mitigating circumstances. The plurality noted that "Virginia's death penalty statute gives the jury greater discretion than other systems which we have upheld against constitutional challenge." (*Id.* at 34 citing *Jurek v. Texas* (White, J. plur.).)[3/]

Thus, to reach its conclusion that Arizona's death penalty is unconstitutional, the Ninth Circuit

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3. Amici note this Court applauded efforts to limit the sentencer's discretion to a consideration of the factors and evidence actually presented at trial. (*California v. Brown*, *supra*, 479 U.S. at 543.)

twisted this Court's jurisprudence inside out. It transformed permission to have "unbridled discretion" into a prohibition of any canalization of sentencer discretion whatsoever. In doing so, it established a third federal requirement that sentencing discretion be unbridled and it precluded legitimate state efforts to direct and guide sentencers in a rational and equitable fashion.[4/]

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4. The Ninth Circuit compounded its error by relying on this Court's cases invalidating "mandatory" death penalty statutes which required the death penalty for certain murders without any individualized consideration of mitigating circumstances to determine the "appropriate" penalty. (*Adamson v. Ricketts, supra*, 865 F.2d at 1042.) The requirement for individualized sentencing has never meant that a state cannot still guide and direct the sentencer's consideration of mitigating evidence. (*Franklin v. Lynaugh, supra*, 108 S.Ct. at 2331 (White, J. plur.).)

CONCLUSION

Amici curiae request this Court to grant the petition for writ of certiorari in order to vindicate the constitutionality of state efforts to channel and direct sentencer discretion in capital cases.

Respectfully submitted,

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